CORPORATIONS

Right of Stockholders to Inspect Corporate Records

The plaintiff, Flowers, was the owner of more than one-fourth of the stock of the defendant corporation, The Rotary Printing Company. By a series of letters passing between the plaintiff, and the officers of the corporation, requests to examine the minutes, books and records of the corporation were made and refused. A mandatory injunction was sought to compel the corporation to permit the plaintiff to inspect the books and records of the defendant. The Common Pleas Court of Huron County found that the plaintiff was entitled, under the statute, to a penalty of $4,950.00.[1] Acting within the broad discretion permitted by the statute, the trial court remitted all but $950.00 on the condition that the plaintiff be allowed to examine the corporate records. On appeal the corporation contended that the refusal of the demand of a stockholder for permission to examine the books and records of a corporation is not one of the things for which the penal provision of Section 8623-127[2] may be invoked. The Court of Appeals held that "subdivision (e) of Section 8623-127, General Code, which provides that a 'failure to do any act required by this act to be done, shall be subject to a penalty,' relates not only to the enumerated acts and duties enjoined upon corporations in that particular section, but relates to the whole General Corporation Act, and a failure by a corporation to allow inspection of its books and records by a shareholder as provided in Section 8623-63,[3] General Code, subjects the corporation to the penalty provided by Section 8623-127, General Code."[4]

[1] Under Sec. 8623-127.

[2] Ohio G. C. §8623-127 provides: "Every corporation which shall neglect, fail or refuse (a) to keep and maintain or cause to be kept and maintained the books of account required by this act to be kept and maintained, or (b) to keep minutes of the proceedings of its incorporators, shareholders and directors, or (c) to prepare or cause to be prepared and cause to be certified the statement of profit and loss and balance sheet required to be prepared, or (d) fail, within three days after request, to mail such statement of profit and loss and balance sheet to any shareholder making request, or (e) to do any act required by this act to be done, shall be subject to a penalty of one hundred dollars ($100) and the further penalty of ten dollars ($10) for every day, beginning three days after written request, that such default shall continue, to be paid to each shareholder making such request, and the right of each shareholder to enforce payment of such penalty shall be in addition to all other remedies. The court in which any action is brought to enforce such penalty may reduce, remit or suspend such penalty on such terms and conditions as it may deem reasonable when it is made to appear that the neglect, failure or refusal was excusable or that the imposition of the penalty would be unreasonable or unjust."

[3] Ohio G. C. §8623-63 provides: "Every corporation shall keep and maintain adequate

Universal recognition has been given to the right of the stockholder to inspect the books and records of the corporation in which he has made an investment.[5] "The real owners of all the net assets of any corporation are the stockholders." [6] A stockholder is entitled to reliable information as to the condition and manner of conducting the firm's business,[7] to see whether the capital of which he has contributed a share is being prudently and profitably employed.[8] Those in charge of its affairs are the agents and trustees employed to care for and manage the property of the corporation and conduct its operations.[9]

In the United States [10] the common law view adopted did not confer an absolute or unqualified right of inspection in favor of the stockholder. The privilege must be exercised for a purpose germane to the stockholder's interests or for advancing the interests of the corporation.[11]

"The right of inspection, either generally or with respect to certain specific books and records, is expressly given by the constitution in a few states.[12] In most of the states it is the subject of statutory enactment and the statutes of the various states differ ma-

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and correct accounts of its business transactions, including accounts of its assets, liabilities, receipts, disbursements, gains, losses, stated capital and shares, together with such particular accounts as are required by this act.

"The books of account, lists of shareholders, and their addresses, records of the issuance and transfer of shares, voting trust agreements, if any are filed, and the minutes of meetings of every corporation shall be open to the inspection of every shareholder at all reasonable times save and except for unreasonable or improper purposes."

[4] Flowers v. The Rotary Printing Co., 65 Ohio App. 543, 19 Ohio Op. 249, 31 N. E. (2d) 251, 1940. *Motion to certify overruled,* October 2, 1940.

[5] 5 FLETCHER, CORPORATIONS (1931) §§2213-2215; 13 AM. JUR., "Corporations," §§432-449.

[6] *See* The William Coale Development Co. v. Kennedy, 121 Ohio St. 582, 585, 170 N. E. 582 (1930).

[7] Annotation (1923) 22 A. L. R. 24.

[8] Otis-Hidden Co., *et al* v. Scheirich, 187 Ky. 423, 219 S. W. 191, 22 A. L. R. 19, 22 (1920).

[9] *Ibid;* The William Coals Development Co. v. Kennedy, 121 Ohio St., 582, 170 N. E. 582 (1930), cited *supra* note 6; State of Wisconsin *ex rel.* B. A. Dempsey v. Werra Aluminum Foundry Co., 173 Wis. 651, 182 N. W. 354, 22 A. L. R. 5 (1921); Foster v. White, 86 Ala. 467, 6 So. 88 (1888).

[10] "According to the English doctrine, a stockholder, in the absence of a statute conferring the right, has no right of inspection of the corporate books for the purpose of acquiring knowledge of facts upon which to create a dispute; but there must be a defined and distinct dispute already in existence with reference to which the right of inspection is demanded." See note 8 *supra.*

[11] See note 5 *supra;* Guthrie v. Harkness, 199 U. S. 148 (1905); Annotations (1926) 43 A. L. R. 783, (1929) 59 A. L. R. 1373.

[12] CALIF. CONST. Art. XII, §14; LOUISIANA CONST., 1898, Art. CCVL, §273.

terially in their terms and with respect to rights conferred." [13] Courts are not in accord as to the nature of the right to inspect the books of a corporation conferred by the statutory or constitutional provision. In some jurisdictions it is said that the right where there are no express limitations is an absolute and arbitrary one, that the court aids in its exercise without reference or regard to the motive of the stockholder requesting the inspection.[14] In other states the provisions authorizing the stockholders to inspect the books have been held to confer an absolute right of inspection but the enforcement of the right, usually by mandamus,[15] is within the sound judicial discretion of the court and the remedy by mandamus may be withheld where the stockholder has a wrongful or a sinister purpose.[16] Ohio is apparently committed to the view that the stockholder may inspect the books of the corporation but "the privilege must be exercised in good faith and that the stockholder must have intent to inform himself as a stockholder as to the management and state of affairs of the company." [17] The Ohio Supreme Court has held ". . . a presumption of good faith and honesty of purpose attends a request by a stockholder for permission to inspect the books of account until the contrary is made to appear by evidence produced by the officer or agent of the corporation objecting to the inspection." [18] The Ohio statute merely changes the burden of proof in regard to the issues of motive and purpose, shifting it from the stockholder, where it rested at common law, to the corporation resisting the inspection of its records.

Denial of this right of inspection to the stockholder, in a proper case, exposes the corporation to a barrage of remedies including extraordinary legal and equitable writs and actions for damages or penalties.

[13] 5 FLETCHER, CORPORATIONS (1931) §2215.

[14] State of Wisconsin ex rel. B. A. Dempsey v. Werra Aluminum Foundry Co., 173 Wis. 651, 182 N. W. 354 (1921); Annotations in (1899) 45 L. R. A. (N. S.) 185, (1913) 42 L. R. A. (N. S.) 332; Venner v. Chicago City Ry. Co., 246 Ill. 170, 92 N. E. 643, 20 Ann. Cas. 607 (1910).

[15] See *infra*. notes 19 and 20.

[16] State of Delaware *ex rel.* William Thiele v. Cities Service Co., 31 Del. 514, 115 Atl. 773 (1922); *cf.* State *ex rel.* O'Hara v. National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241 (1903) where the same result is reached on the ground that the statute merely is declaratory of the common law; 5 FLETCHER, CORPORATIONS (1931) §2215; Annotations (1923) 22 A. L. R. 24, (1926) 43 A. L. R. 783, (1929) 59 A. L. R. 1373.

[17] The American Mortgage Co. v. Rosenbaum, 114 Ohio St. 231, 122 N. E. 122, 12 VA. L. REV. 663 (1926).

[18] The William Coale Development Co. v. Kennedy, 121 Ohio St. 582, 170 N. E. 434 (1930).

In the United States it is generally held by the great weight of authority that mandamus is the preferable remedy to enforce the stockholder's right.[19] This writ is usually directed to the officers of the corporation having the custody of the books and refusing the right of inspection. In Ohio mandamus will not lie to enforce a stockholder's prerogative to inspect the books of a corporation, it being held that mandatory injunction is the proper remedy.[20]

An action for damages is generally inadequate as a remedy. The value of a stockholder's right to inspect the books of a corporation is only speculative [21] and, as a general rule, only nominal damages are recoverable.[22] The value of the plaintiff's time in attempting to secure the right of inspection and the sums paid as attorney's fees are generally not recoverable [23] as actual damages in absence of a statute providing for such an allowance.[24] One court has permitted an action at law for damages only against the officers of the corporation who refused to allow the inspection, the corporation not being rendered liable for damages in absence of a statute permitting such a recovery.[25] As a practical matter the stockholder generally is not interested in damages for the deprivation of his right of inspection. It may be years before the damages are known and even then they could not be accurately measured.[26]

To obviate this problem inherent in the matter of obtaining satisfactory compensation in the form of damages, the legislatures of many states have enacted statutes imposing penalties against the

[19] Dennison v. Needle, 274 Mass. 416, 174 N. E. 687 (1931); Nolan v. Guardian Coal and Oil Co., 119 W. Va. 545, 194 S. E. 34 (1937); *see Annotations* (1923) 22 A. L. R. 24, (1926) 43 A. L. R. 783, (1929) 59 A. L. R. 1373.

Ordinarily a court of equity has no power to grant extraordinary aid as a matter of primary and independent relief. Unless the stockholder has exhausted his rights and remedies at law, a bill in equity to enforce the privilege of inspection cannot be maintained unless it is ancillary to other equitable relief sought by the stockholder against the corporation or its officers. (Ohio is contra. See *infra* note 20.)

[20] Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732 (1900). This holding is, in part, based on provisions of the Ohio statute relative to mandamus (Ohio G. C. 12283) to the effect that "mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation or board, or person commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." Ohio stands almost alone on the holding that mandatory injunction for relief in equity is the proper remedy. 13 Am. Jur., "Corporations," §444.

[21] Arias v. Usera, 38 F. (2d) 235 (1930).

[22] Bourdette v. Sieward, 107 La. 258, 31 So. 630 (1902).

[23] Boardman v. Marshalltown Grocery Co., 105 Iowa 448, 75 N. W. 343 (1898).

[24] State *ex rel.* Charnat v. Siegal, 119 Neb. 374, 229 N. W. 118 (1930).

[25] Legendre v. New Orleans Brewing Assn., 45 La. Ann. 669, 12 So. 837 (1893).

[26] Cockburn v. Union Bank, 13 La. Ann. 289, cited in 19 Ann. Cas. 308, 311 (1911).

corporation or its officers for the wilful or wrongful refusal or denial of the right to inspect, thereby saving the necessity of proof of damages and limiting and fixing the liability of the offender.[27] These exactions are justified on the ground that they punish the offending corporation or officer [28] and compel the performance of the duty.[29] To incur the penalty the corporation or an officer thereof must willfully neglect or refuse to accord the shareholder his rights to the inspection of the common property [30] and no special injury need be alleged or proved.[31] The amounts exacted are severe enough to secure compliance.

Most of the statutes providing for penalties when the stockholder is denied access to the records of the corporation are more specific than the Ohio statute in defining what conduct will bring a corporation or its officers within its purview and justify the imposition of the specific penalty.[32]

Under Sec. 8623-63,[33] the corporation is required to keep the various books and records there enumerated. The second paragraph of this section provides: "The books of account, lists of shareholders and their addresses, records of the issuance and transfer of shares, voting trusts agreements, if any are filed, and the minutes of meetings of every corporation shall be open to the inspection of every shareholder at all reasonable times save and except for unreasonable or improper purposes." Subsection (a) of Sec. 8623-127 [34] specifically penalizes failure or refusal to keep books of account but the failure or refusal to permit an inspection thereof is not specifically enjoined.

The plaintiff in the principal case nevertheless contended [35] that unless the statute could be invoked the corporation could refuse inspection with impunity, and that the books and transactions of the corporation could be concealed from the stockholder. The defendant

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[27] Lewis v. Brainerd, 53 Vt. 516 (1881); *cf.* Kelsey v. Pfaudler Process Fermentation Co., 3 N. Y. S. 723, 51 Hun. 636 (1889) where the court said that damages may also be recovered when they are the result of a neglect or refusal to permit inspection.

[28] Brown v. Kilden, 58 Wash. 184, 108 Pac. 452 (1910).

[29] Cox v. Paul, 175 N. Y. 328, 67 N. E. 586 (1903).

[30] *Ibid.;* Lewis v. Brainerd, 53 Vt. 516 (1881), cited *supra* note 27.

[31] Williams v. College Corner and Richmond Gravel Road Co., 45 Ind. 170 (1873); Brown v. Kilden, 58 Wash. 184, 108 Pac. 452 (1910), cited *supra* note 28.

[32] 5 FLETCHER, CORPORATIONS (1931) §2257.

[33] *Supra* note 3, for the wording of the section.

[34] *Supra* note 2, for the wording of the section.

[35] Brief for Plaintiff-Appellee on Motion to Certify in the Supreme Court, pp. 4-5.

contended:[36] "The positive acts required to be done by the corporation under Section 8623-127, G. C., and the failure to do which are subject to the penalties therein, are those spoken of under (a), (b), (c) and (d) of the section; that by the rule *expressio unius est exclusio alterius* the requirements of (e) are not included in the penal clause of the section, because the penal clause is all inclusive in that section and does not refer to or include any other section of the act."

Under the Ohio cases the right to inspect the books and records of the corporation is a property right[37] incidental to ownership of the net assets of the corporation through the medium of shares and is of considerable value although it cannot be calculated or ascertained in money.[38] The privilege of inspection is conferred to conserve his right as a stockholder.[39] Defiance of these mandates and the violation of the apparent spirit of the statute by the corporation would frequently find the ordinary stockholder unable to maintain and finance the litigation necessary to enforce his right unless protracted delay is made unprofitable to the corporation or its officers. On the basis of policy, therefore, the interpretation of Sec. 8623-127, G. C., in the *Flowers* case is correct.

It is somewhat peculiar that the court instead of merely refuting the defendant's contention for the application of the maxim *expressio unius est exclusio alterius* did not also discuss the effect of Sec. 8623-1 on the solution of the problem before it. The initial section of the General Corporation Act defines the term "this act" as used in Sec. 8623-127 and elsewhere as including "Sections 8623-1 to 8623-138, inclusive, General Code, and . . . shall be known and may be cited as the General Corporation Act, and as so constituted is hereinafter referred to as *'this act'*."

Although there is no clear cut Ohio decision which so holds,[40] it would appear as a matter of reason and principle that when the legislature in a particular act defines the terms used and declares that the terms shall receive a certain construction, the court, if not

[36] Flowers v. Rotary Printing Co., 65 Ohio App. 543, 545, 19 Ohio Op. 249, 31 N. E. (2d) 251 (1940), cited *supra* note 4.

[37] Riggs v. Whippey Process and Engraving Co., 7 Ohio L. Rep. 446 (1909).

[38] Whitney v. American Shipbuilding Co., 14 Ohio N. P. (N. S.) 12, 23 O. D. 1, 19 O. C. C. (N. S.) 584 (1912).

[39] *See supra*, notes 5 to 32, inclusive.

[40] *See* the dissent of Lieghley, J., in Union Fratellanza Oratinese v. Picciano, 18 Ohio L. Abs. 200 (1935), *majority opinion reversed* in 129 Ohio St. 468, .. N. E. .. (1935).

bound thereby, should accept the definition of the legislature in ascertaining or giving effect to intention from the language of the enactment itself.

CRIMINAL LAW

FEDERAL ANTI-RACKETEERING STATUTE—CONSTITUTIONALITY OF PROVISION FOR SUIT ONLY AT DIRECTION OF ATTORNEY-GENERAL

An indictment was found against the defendant, based upon the federal anti-racketeering statute. The defendant challenged both statute and indictment; the former because it provides that prosecution under it "shall be commenced only upon the express direction of the attorney-general of the United States," [1] the latter because of its declaration that "this prosecution has been commenced upon the express direction of the attorney-general of the United States." The demurrer was overruled. *U. S.* v. *Bioff et al.*[2]

In challenging the statute itself, defendant relies upon both the doctrine of procedural due process and that of non-delegability of legislative power. In adversely disposing of the due process objection the court reasoned that the attorney-general's power over the suit is but an adaptation of the prosecuting attorney's historic power, without leave of court, to arrest prosecution by *nolle prosequi*.[3] It might have added that the existence of such accepted power in the attorney-general in no way resembles those serious interferences with the conduct of an impartial trial which have been judicially condemned in the name of due process.[4] The other constitutional contention is more difficult of disposition. If the power of control over criminal prosecutions under the act involves, not the policy formulation that is the essence of the legislative function but that judgment as to law enforcement which is intrusted to the executive, the answer

[1] 48 Stat. 980, 18 U. S. C. A. Sec. 420 C. (Supp. 1940).

[2] 40 F. Supp. 497 (S. D. N. Y. 1941)

[3] U. S. v. Woody, 2 F. (2d) 262 (D. Mont. 1924).

[4] Moore v. Dempsey, 261 U. S. 86 (1923), mob domination of trial; Brown v. Miss., 297 U. S. 278 (1935), conviction upon third-degree evidence; *see* Mooney v. Holohan, 294 U. S. 103 (1935), indicating a similar result in case of conviction on perjured testimony.